11-2011

The "Party Scope" of exclusive jurisdiction clauses: Global Partners Fund Ltd v Babcock & Brown Ltd

Adeline CHONG
SMU, adelinechong@smu.edu.sg

inspection by that individual company.) Similarly, at Antwerp the vessel was submitted to separate physical inspections by Shell and by Conoco.[23] It appears that both owners and charterers may have shared a background assumption that only an informal approval letter from a company based on a physical inspection by that company would provide adequate comfort that formal approval from that company would be forthcoming.

Whether the case is considered in the light of how the SIRE system is officially supposed to work, or in the light of this background assumption, it might well be said that, if a charterer wants assurance that a vessel will probably not be rejected by a particular company, he should insist on a vessel with an informal approval letter from that company. If owners undertake only to have informal letters from five other companies, it may be questioned whether the owners' undertaking should be considered as an acceptance of responsibility for consequences in way of a failure to obtain approval from a company other than the five companies listed, or only as accepting responsibility for consequences in way of a failure to obtain formal approval from one of the five companies listed.

Robert Gay*

THE ''PARTY SCOPE'' OF EXCLUSIVE JURISDICTION CLAUSES

Global Partners Fund v. *Babcock & Brown*

Coherency in international litigation and upholding exclusive jurisdiction clauses, for the most part,[1] work hand in hand. Courts generally take jurisdiction on very wide and exorbitant grounds.[2] There is therefore the ever-present risk of irreconcilable judgments stemming from multiple courts hearing disputes arising from the same transaction or state of affairs. One way in which such a risk is averted is by giving effect to exclusive jurisdiction clauses where parties have included such clauses into their contracts.[3] Thus, when faced with an action brought in breach of an exclusive jurisdiction clause in favour of another forum, the starting position is that the court will stay its proceedings unless the plaintiff is able to show "strong cause" or "strong reasons" why he should be allowed to breach his promise to sue exclusively in another forum.[4] Another means by which the courts strive to uphold exclusive jurisdiction clauses is by taking a liberal construction of them.

There are two aspects to taking a liberal construction of an exclusive jurisdiction clause: first, in terms of the "subject matter scope" and, secondly, in terms of the "party scope" of the clause.[5] On the first, the foremost decision is *Fiona Trust* v. *Privalov*,[6] where the House of Lords made it clear that semantics had no role to play and, in the absence of

23. At [45].

* Solicitor, Hill Dickinson LLP; member of the Documentary Committee of Intertanko.

1. *Cf Donohue* v. *Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425.
2. *Global Partners Fund Ltd* v. *Babcock & Brown Ltd (in liq)* [2010] NSWCA 196; 79 ACSR 383, [68].
3. See the Hague Convention on Choice of Court Agreements 2005.
4. *The Eleftheria* [1969] 1 Lloyd's Rep 237; *The El Amria* [1981] 2 Lloyd's Rep 119.
5. The phrases "subject matter scope" and "party scope" are derived from the judgment in *Global Partners* v. *Babcock & Brown* [2010] NSWCA 196.
6. [2007] UKHL 40; [2007] Bus LR 1719; [2008] 1 Lloyd's Rep 254.

explicit wording, contractual and non-contractual claims alike should be taken to fall within the scope of a clause.[7] The second aspect of taking a liberal construction of an exclusive jurisdiction clause concerns the question of who can enforce the promise contained in the exclusive jurisdiction clause. This issue—that of the clause's "party scope"—was considered by the New South Wales Court of Appeal in *Global Partners Fund Ltd* v. *Babcock & Brown Ltd (in liq)*.[8]

The facts

The applicants, Global Partners Fund Ltd (hereafter "GPF"), were the managing general partner of a partnership, Global Partners Fund LP, which was constituted under the UK Limited Partnerships Act 1907. A consortium made up of the partnership, several Babcock & Brown Group entities and the Royal Bank of Scotland made an ill-advised investment in Coinmach Service Corporation, a Delaware company. A "Coinmach deal team" formed by the Babcock & Brown Group had handled negotiations with respect to the Coinmach acquisition on behalf of the consortium and allegedly failed to act in the interests of the partnership. GPF commenced proceedings in New South Wales against various entities of the Babcock & Brown Group, ie Babcock & Brown Ltd ("BBL"), Babcock & Brown International ("BBI"), Babcock & Brown LP ("BBUS"), and BBGP Managing General Partner Ltd ("BBMGP"), for breaches of fiduciary duty and breaches of a common law duty of care to the partnership. This was on the basis that the defendant entities were responsible at law for, and had knowledge of, the conduct of the Babcock & Brown Coinmach deal team.

The issue facing the New South Wales Court of Appeal was whether it should stay its proceedings, as similar proceedings involving substantially the same issues had been commenced in England.[9] Crucially, there was an exclusive jurisdiction clause for English courts in the relevant agreement. This agreement was the Limited Partnership Agreement (hereafter "LPA"), to which all partners were party. The exclusive jurisdiction clause, LPA, cl 18.11, stipulated that:

> "This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England and all the parties irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the Private Placement Memorandum or the acquisition of Commitments . . . "

GPF and BBMGP were parties to the LPA. BBL, BBI and BBUS were not parties to it but argued that GPF was bound by the exclusive jurisdiction clause in relation to its claims against them. An attempt by GPF to argue that its causes of action, other than those involving BBMGP, did not "arise out of or in connection with" the LPA, as they depended on rights created at law rather than by contract, failed. The Court of Appeal echoed *Fiona*

7. See also in the choice of law context, Arts 10(1) and 14 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (the "Rome II Regulation") [2007] OJ L199/40.
8. [2010] NSWCA 196; 79 ACSR 383.
9. *Infra*, text to fn 51.

Trust and held that there was no basis for a narrow interpretation of an exclusive jurisdiction clause in an international contract in terms of its subject matter scope.[10]

GPF's other argument was founded on the party scope of the exclusive jurisdiction clause. GPF argued that BBL, BBI and BBUS, as third parties to the LPA, were not entitled to invoke one of the clauses contained in it. The Court of Appeal disagreed and held that those entities were entitled to the protection of the English exclusive jurisdiction clause. What is significant about the decision is that the court accepted that the third parties had an independent right to enforce the exclusive jurisdiction clause.

A matter of construction of the clause

An exclusive jurisdiction clause in a contract usually involves A and B promising each other that they will sue each other exclusively in one particular forum. If the scope of the promise is not spelled out clearly, an issue may arise as to whether the parties also agreed to sue C, a third party, exclusively in that single forum. It is a matter of construction of the clause, as indicated by the governing law of the contract, or governing law of the clause if this differs from the former, whether the parties' intentions extended to C.

English law, as the governing law of the LPA, governed the construction of cl 18.11. The clause was widely worded, referring merely to "any disputes which may arise out of or in connection with" the LPA without requiring the disputes to be between the contracting parties to the LPA. Rix J (as he then was) in *Credit Suisse* v. *MLC*[11] had robustly denied that a jurisdiction clause worded in this manner gave any rights to a third party: "in the absence of plain language to the contrary, a contract seeks neither to benefit nor to prejudice non-parties: even where such plain language is used, it is black-letter law that the non-party can himself neither take the benefit nor suffer the burden of the contract".[12]

However, Teare J in *Morgan Stanley & Co International Plc* v. *China Haisheng Juice Holdings Co Ltd*[13] was prepared to admit a more generous approach to construing the party scope of exclusive jurisdiction clauses, although on the facts of that case he ultimately did not accept a wide construction. The clause in that case, cl 13(b)(i), was in favour of the English courts and was expressed to cover "any suit, action or proceedings relating to any dispute arising out of or in connection" with the contract. Teare J accepted that those words were capable of being interpreted in two ways: first, to apply only to disputes between the contracting parties; secondly, to apply also to claims by the contracting parties against third parties where those claims related to a dispute which arose out of or in connection with the contract.[14] Teare J, however, emphasised that the words did not stand alone but had to be construed in the context of the whole agreement, in particular cl 13 itself. Teare J concluded that, while cl 13 dealt with the rights held by third parties,[15] it did not deal with claims against third parties. The fact that the agreement dealt expressly with claims *by* third parties but did not deal expressly with claims *against* third

10. [2010] NSWCA 196, [68].
11. [1999] 1 Lloyd's Rep 767.
12. *Ibid*, 777.
13. [2009] EWHC 2409 (Comm); [2010] 1 Lloyd's Rep 265.
14. *Ibid*, [23].
15. Specifically, cl 13(b)(ii) gave third parties, subject to certain conditions, the right to sue parties to the contract in England.

parties indicated that the parties did not intend the latter claims to fall within the scope of the exclusive jurisdiction clause.

Therefore, words alone are not determinative. The context and background hold important clues as to the contracting parties' intentions on the party scope of a clause. In *GPF* v. *Babcock & Brown*,[16] the Court of Appeal stressed that: "Each contract must be interpreted in its context. Similar, even identical words do not necessarily have the same meaning in different contexts". The court observed that "there are non-parties and non-parties".[17] BBL, BBI and BBUS could not be said to be members of an undifferentiated group of "non-parties".[18] They were patently not strangers to the LPA.[19] The LPA and associated documents[20] made reference to the "Babcock and Brown Group", of which BBL, BBI and BBUS were members. Further, the LPA envisaged that other members of the Babcock & Brown Group apart from BBMGP would also be involved in making decisions with respect to the partnership's investments. The proceedings obviously arose from decisions made pursuant to the LPA. In addition, the court gave particular weight to the fact that BBL, BBI and BBUS as "associates" of BBMGP were entitled to the benefit of certain indemnification provisions contained in the LPA. Thus: "In a context where the very contract confers rights on identified non parties, the choice of law and exclusive jurisdiction clauses should be construed as binding the parties with respect to proceedings in which such an indemnity may arise".[21]

The case thus involved the situation where A (GPF) had promised B (BBMGP) that it will sue B and its associates C (BBL, BBI and BBUS) exclusively in England.

Who can enforce the promise?

Once it is established that, as a matter of construction, A has promised B to sue B and C only in England, the next issue is who can hold A bound to this promise. If English law is the applicable law,[22] it is trite law that B can enforce A's promise in relation to A's conduct towards both B and C. Where A, B and C are all parties to the action, *Snelling* v. *John G Snelling Ltd*[23] establishes that B can have A's claim against itself and C dismissed. Even where A sues only C, B can approach the court to request a stay or a dismissal of the proceedings against C. Lord Scott of Foscote in *Donohue* v. *Armco*[24] opined that, if an exclusive jurisdiction clause is expressed to cover "any dispute which may arise out of or in connection" with the agreement and is not worded such as to be limited to "any claim against" the contracting parties to the contract, the exclusive

16. [2010] NSWCA 196, [72].
17. *Ibid*, [74].
18. *Ibid*, [78].
19. *Ibid*, [74].
20. Principally, the Private Placement Memorandum, which made it clear that investments made by the partnership were to be generated by members of the Babcock & Brown Group.
21. *Ibid*, [79].
22. The English cases discussed here are also accepted as part of Australian law. See JW Carter, *Carter on Contract* (LexisNexis Australia), ch 17.
23. [1973] QB 87.
24. [2001] UKHL 64; [2002] 1 Lloyd's Rep 425, [61]. The other members of the House of Lords did not consider this point; Lord Bingham of Cornhill regarded it as inappropriate to consider this aspect as it was not the subject of argument before the House of Lords: *ibid*, [14]. Lord Scott's dictum was applied in *Winnetka Trading Corp* v. *Julius Baer International Ltd* [2008] EWHC 3146 (Ch); [2009] Bus LR 1006.

jurisdiction clause is "broken if any proceedings within the scope of the clause are commenced in a foreign jurisdiction, whether or not the person entitled to the protection of the clause is joined as a defendant to the proceedings". However, B must show that he has a sufficient interest of his own to protect; in commercial cases the requirement of a sufficient interest usually translates to a financial interest.[25] An obligation on B's part to indemnify C[26] or B's liability as a co-tortfeasor[27] qualifies as a sufficient interest such that to allow the action by A against C to proceed would be construed as a fraud on B.

That BBMGP was a party to the action meant that the decision could be justified on orthodox principles. Hammerschlag J at first instance[28] was clear that a stay was justified on the basis that B was a party to the proceedings and was entitled to enforce cl 18.11.[29] He thought that, whether or not cl 18.11 could be construed to extend to B's associates,[30] the addition of the associates as defendants did not alter this position.[31] The judgment of the Court of Appeal was more oblique on whether the decision rested solely on B's being a party to the application.[32] The Court of Appeal held that A's promise, as embodied by cl 18.11, was not merely to sue B exclusively in England, but also to sue C exclusively in England. On orthodox principles, B had the contractual right to insist on the operation of the exclusive jurisdiction clause not only with respect to the claims against itself, but also with respect to the closely related and relevantly identical claims against C.[33] Crucially, however, the court accepted that: "BBL, BBI and BBUS are also entitled to approach the Court, *in their own right*, to request that the Court exercise its discretion to grant a stay. This is so because of their involvement in the affairs of the Partnership, as envisaged by the LPA itself, and the rights conferred upon them as Indemnified Persons under the LPA".[34]

What is the basis for C's independent right to hold A bound?

There are practical rationales for giving C a right to hold A bound. First, if B is not also sued by A and is reluctant to get involved, C may have to join B as a party[35] and compel B to enforce A's promise.[36] This may be by showing that B is a trustee of that promise for C,[37] which may not be altogether easy to establish.[38] Giving C the right to sue A itself gets rid of such hurdles. Secondly, it helps to prevent evasion of the contractual bargain.

25. *Deepak Fertilisers and Petrochemicals Corp* v. *ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387.
26. *Gore* v. *Van Der Lann* [1967] 2 QB 31.
27. *Donohue* v. *Armco* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425, [60].
28. [2010] NSWSC 270; 267 ALR 144.
29. This was an alternative ground for his decision granting a stay. The primary ground was that GPF lacked standing to bring the action because a partnership had no separate legal personality. A further alternative ground was that New South Wales was *forum non conveniens*. Neither ground was considered by the Court of Appeal.
30. Although Hammerschlag J preferred the construction that cl 18.11 did cover C: *ibid*, [130].
31. *Ibid*, [131] and [133].
32. See [2010] NSWCA 196, esp at [71–80].
33. *Ibid*, [73].
34. *Ibid*, [73] (emphasis added).
35. The joinder of co-defendants is a procedural matter governed by the *lex fori*.
36. For Australian law, see *Global Brand Marketing Inc* v. *YD Pty Ltd* [2010] FCA 323.
37. *Fletcher* v. *Fletcher* (1844) 4 Hare 67; *Trident General Insurance Co Ltd* v. *McNiece Bros Pty Ltd* (1988) 165 CLR 107, esp at 121 and 146–149.
38. *Vandepitte* v. *Preferred Accident Insurance Corp of New York* [1933] AC 70; (1932) 44 Ll L Rep 41.

Two scenarios present themselves: assuming that C is a close affiliate of B, (i) A sues C, or sues B and C, in a non-chosen forum; and (ii) C, not B, sues A in a non-chosen forum. *Babcock & Brown* restricts attempts by A to evade an exclusive jurisdiction clause either by pursuing a claim against C alone in the expectation that the proceedings against C would exert pressure on B, or pursuing claims against both B and C and arguing that the joinder of C takes the claims outside the exclusive jurisdiction clause.[39] The second scenario, described as the "friends and relations" point by Stuart-Smith LJ in *Donohue* v. *Armco*,[40] is not resolved by *GPF* v. *Babcock & Brown* because of the clear principle that C should not be burdened by a clause to which it has not agreed.[41] The parties may themselves prevent this form of evasion by clear drafting;[42] but, in the absence of that, it is difficult to see how the courts would be able to restrict this type of evasion unless there is evidence of abuse of process. The best advice might be for A to counter-sue B in the chosen forum and then seek an anti-suit injunction against the proceedings brought by C or petition the court hearing the proceedings brought by C to stay its proceedings, if such avenues are available in the relevant fora.

Practical justifications aside, what was the basis for the associates' right to hold A bound? The court was clear that the associates' right to request a stay was not contractual in nature as they were not parties to the LPA and LPA, cl 18.15 excluded the operation of the Contracts (Right of Third Parties) Act 1999.[43] The exceptions to the common law privity rule did not appear to apply either. Therefore, the operation of English privity rules should have prima facie denied the existence of any independent right on the associates' part to approach the court. Even if the parties' intentions had extended to C's having the benefit of cl 18.11, intentions are irrelevant when the privity rules of the governing law of the contract, or governing law of the jurisdiction clause, as the case may be,[44] do not allow for a third party to claim that benefit for itself. It might be that the court considered clause 18.11 to be separable from the rest of the contract[45] so that cl 18.15 and its exclusion of the 1999 Act did not prevent the associates from seeking to rely on cl 18.11. Or perhaps the court, which proceeded on the basis that there was no relevant difference between English law and Australian law on the issue of construction of the clause, was subtly influenced by *Trident General Insurance Co Ltd* v. *McNiece Bros Pty Ltd*,[46] where three members of the High Court of Australia held that a third-party beneficiary to an insurance policy could sue directly on the policy. However, neither the separability argument nor *Trident*[47] was referred to in the judgments and it would be too much to conjecture that they played any role in the court's decision.

39. Eg, *Morgan Stanley* v. *China Haisheng Juice Holdings* [2010] 1 Lloyd's Rep 265. This tactic was also attempted in *GPF* v. *Babcock & Brown*: see [2010] NSWSC 270, [160]; [2010] NSWCA 196, [94].

40. [2000] 1 Lloyd's Rep 579, [43].

41. Unless it is the case that the privity rules of the governing law of the contract allow for this.

42. See A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford, 2008), 160 (cl (g)(i)).

43. Clause 18.15 is reproduced in Sched A, which is attached to the decision at first instance: [2010] NSWSC 270.

44. If the governing law of the contract is different from the governing law of the jurisdiction clause, the latter law applies to the issue of whether C is entitled to rely on the jurisdiction clause.

45. *Benincasa* v. *Dentalkit* (Case 269/95) [1997] ECR I-3767.

46. [1988] HCA 44; 165 CLR 107.

47. In any event, it is unclear to what extent *Trident* establishes an exception to the common law privity doctrine. It is generally thought to be confined to the insurance context. See *Re Winterton Constructions Pty Ltd* v. *Hambros Aust Ltd and Pan Properties Pty Ltd* [1991] FCA 171; 101 ALR 363, [21].

It is suggested that a basis for giving C a right to hold A bound may be found in the maxim *interest reipublicae ut sit finis litium*. As Ackner J observed in *The Elbe Maru*,[48] when B requests a stay of proceedings in relation to an action by A against C, if the action by A ought not to be brought, the court should intervene and stop it rather than have a series of circuitous actions, namely, following the action by A against C, C claims against B and subsequently B claims against A.[49] This rationale extends to the situation where C is itself seeking the stay. If C would seek indemnification from B and B in turn would seek indemnification from A, this would provide grounds for the court to intervene and grant C the stay. It was not clear on the facts of *GPF* v. *Babcock & Brown* whether this route was open to C[50] but, if present, it provides a compelling justification for the court's decision. Where there would be circuitous actions and the action by A against C ought not to be brought, either B *or C* should be able to approach the court to request a stay of proceedings. On the facts, the action in New South Wales arguably ought not to be brought because of the doctrine of *forum non conveniens*. Further, this doctrine furnished a stand-alone justification for awarding a stay.

Forum non conveniens

There were related proceedings taking place in England. One of the actions, commenced three days after the New South Wales proceedings, involved BBI, BBUS and BBMGP suing the partnership and GPF for an order that BBMGP be paid management fees and compensation for the termination of its services as general managing partner and negative declarations that each of the plaintiffs did not breach any duties owed to the partnership and GPF in relation to the Coinmach transaction.[51] GPF conceded that cl 18.11 applied to the claims relating to the termination and management fees sought by BBMGP. However, the New South Wales claims involving alleged breaches of fiduciary duty and common law duties of care were also closely related to the English debt action as GPF would be relying on the same conduct complained of in the New South Wales proceedings in its defence to the English proceedings.[52]

It is suggested that the doctrine of *forum non conveniens* alone would have furnished a satisfactory basis for the staying of all actions. Of course, the Australian "clearly inappropriate forum"[53] version of the *Spiliada* test[54] works a bit differently from the

48. *Nippon Yusen Kaisha* v. *International Import and Export Co Ltd (The Elbe Maru)* [1978] 1 Lloyd's Rep 206.

49. *Ibid*, 210. See also *Rockwell Graphic Systems Ltd* v. *Fremantle Terminals Ltd* (1991) 106 FLR 294, 304; *Chapman Marine Pty Ltd* v. *Wilhelmsen Lines A/S* [1999] FCA 178, [65].

50. The indemnification provisions referred to in the judgments were those found in the LPA, where A agreed to indemnity B and C for services rendered pursuant to the LPA.

51. There was no application before the New South Wales court to restrain either of these proceedings: [2010] NSWSC 270, [151].

52. *Ibid*, [156].

53. The Australian "clearly inappropriate forum" test focuses on the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum: *Oceanic Sun Line Special Shipping Co Inc* v. *Fay* (1988) 165 CLR 197; *Voth* v. *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. *Cf* the UK approach, which focuses on a comparative *forum non conveniens* test: *Spiliada Maritime Corp* v. *Cansulex Ltd* [1987] AC 460; [1987] 1 Lloyd's Rep 1.

54. *Ibid*.

English version, but Hammerschlag J at first instance at least was prepared to rely on *forum non conveniens* as one of his alternative grounds for ordering a stay.[55]

Conclusion

There are strong policy reasons for ensuring that the scope of exclusive jurisdiction clauses extends to as wide a subject matter and to as many parties as possible. As the court in *GPF* v. *Babcock & Brown* noted:[56]

> "A significant purpose of an exclusive jurisdiction clause is to ensure that all disputes are determined in a coherent manner by a single jurisdiction. There is a clear commercial interest in minimising the possibility of a dispute being determined by multiple tribunals, with the consequent prospect of divergent findings."

GPF v. *Babcock & Brown* boiled down to two main issues: construction and enforcement of the promise. On the first, it should always be remembered that the construction exercise is aimed at discovering the contracting parties' intentions and the temptation to serve policy reasons, however strong these may be, by stretching the parties' intentions to extend to a third party must be resisted. On the facts of the case, C's intimate involvement with the LPA justified the court's construction. Once the parties' intentions are properly found to include C, the second issue is who is entitled to enforce the promise contained in the clause. Where B is seeking to uphold the clause, little doctrinal problems arise. Where C is seeking to uphold the clause, more work needs to be done. It is suggested that three issues may be considered where C is seeking the stay: (a) whether the privity rules of the relevant governing law allows for this; (b) whether the exercise of the court's discretion against C would result in circuitous actions; and (c) whether there are related proceedings in the chosen forum such that the court could invoke *forum non conveniens* to ensure that all related proceedings against whichever parties are heard in the most suitable forum. Coherency in international litigation may thus be preserved.

Adeline Chong*

VERIFICATION AND CONCLUSIVE EVIDENCE CLAUSES AND FRAUD BY A BANK EMPLOYEE

Jiang Ou v. *EFG Bank*

The Singapore High Court recently ruled against a bank that sought to rely on a verification and conclusive evidence clause (a "verification clause") in defending a claim

55. The Court of Appeal found it unnecessary to consider the impact of the English proceedings, preferring to resolve the issue solely on the basis of the exclusive jurisdiction clause: [2010] NSWCA 196, [7].

56. [2010] NSWCA 196, [67].

* Assistant Professor of Law, Singapore Management University. I would like to thank Professor TM Yeo, the anonymous referee and participants at the 2011 ILA Asia-Pacific Regional Conference, Taipei, Taiwan (where a version of this paper was presented) for useful comments, and Professor Adrian Briggs for bringing this case to my attention. All errors remain my own.